

No.

82-1394

Office-Supreme Court, U.S.
FILED

FEB 14 1983

ALEXANDER C. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

CENTRAL FLORIDA ENTERPRISES, INC.

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION
COWLES BROADCASTING, INC., COWLES
COMMUNICATIONS, INC., NATIONAL BLACK
MEDIA COALITION,

Respondents

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Joseph F. Hennessey*

Lee G. Lovett

LOVETT, HENNESSEY,
STAMBLER & SIEBERT, P.C.

1901 L Street, N.W.

Suite 200

Washington, D.C. 20036

(202) 293-7400

Counsel for Petitioner
Central Florida Enterprises,
Inc.

February 14, 1983

*Counsel of Record

QUESTIONS PRESENTED

(1) Whether, contrary to this Court's decision in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), the reviewing Court ratified actions and decisions of the FCC which have effectively nullified petitioner's statutory right to full and fair hearing to displace an incumbent television licensee in comparative renewal hearing proceedings.

(2) Whether, in light of the result oriented decisional bias in comparative television licensing proceedings in favor of incumbent licensees perpetrated by the Commission and ratified by the reviewing Court, there has been created an unacceptable "chilling" of opportunities for First Amendment expression contrary to the holdings of this Court in *Associated Press v. United States*, 326 U.S. 1, 20 (1945) and *Red Lion Broadcasting v. FCC*, 395 U.S. 396 (1969).

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
The Circuit Court's 1978 Opinion	6
The Circuit Court's 1982 Opinion	10
REASONS FOR GRANTING THE WRIT	10
The <i>Central Florida II</i> Decision Has Created A Chilling Effect On Opportunities For Potential First Amendment Expression	10
The FCC Has Yet To Adopt Rational Standards For The Comparative Renewal Process	13
The FCC Has Resisted Its Obligation To Carry Out Its Statutory Duty To Apply The Full Hearing Requirement To The Comparative Renewal Process	16
The FCC And The D.C. Circuit Court Were Incorrect In Attributing No Demerit Against Cowles For Misconduct Demonstrated On The Mail Fraud Issues	17
The FCC And The Circuit Court Were Incorrect In Evaluating The Main Studio Violation	18
The FCC And The Circuit Court Improperly Evaluated The Diversification Of Mass Media	20
The FCC And The Court Improperly Evaluated Cowles' Past Broadcast Record	21
The FCC And The Court Have Used Improper Legal Standards In Making The Comparative Evaluation Mandated By Ashbacker	22
CONCLUSION	24

TABLE OF AUTHORITIES

Cases:

<i>Ashbacker Radio Corp v. FCC</i> , 326 U.S. 327 (1945)	i, 4, 6, 7, 13, 16, 21, 24
<i>Associated Press v. U.S.</i> , 326 U.S. 1 (1954)	i, 23
<i>Central Florida Enterprises v. FCC</i> , 598 F. 2d 37 (D.C. Cir. 1978), <i>reh'g en banc denied and modi-</i> <i>fied</i> , 598 F. 2d 58 (1979), <i>cert. dismissed</i> , 441 U.S. 957 (1979)	2, 6, 7, 8, 9, 11, 12, 15, 16, 17, 20, 21, 23
<i>Central Florida Enterprises v. FCC</i> , 683 F. 2d 503 (D.C. Cir. 1982)	1, 10, 11, 18, 21, 22, 23
<i>Citizens Communications Center v. FCC</i> , 441 F. 2d 1201 (D.C. Cir. 1971), <i>clarification</i> <i>granted</i> , 463 F. 2d 822 (D.C. Cir. 1972)	10, 13, 14, 15, 16, 21
<i>Communications Investment Corp. v. FCC</i> , 641 F. 2d 954 (D.C. Cir. 1981)	20
<i>Greater Boston Television Corp. v. FCC</i> , 444 F. 2d 841 (D.C. Cir. 1970)	16
<i>Greensboro Television v. FCC</i> , 502 F. 2d 475 (D.C. Cir. 1974)	12
<i>Melody Music v. FCC</i> , 345 F. 2d 730 (D.C. Cir. 1965)	18
<i>National Citizens Committee for Broadcasting</i> <i>v. FCC</i> , 436 U.S. 755 (1975)	21
<i>Office of Communications of the United</i> <i>Church of Christ v. FCC</i> , 359 F. 2d 730 (D.C. Cir. 1966)	18
<i>Office of Communications of the United</i> <i>Church of Christ v. FCC</i> , 425 F. 2d 543 (D.C. Cir. 1969)	18

<i>Red Lion Broadcasting v. FCC</i> , 395 U.S. 396 (1969)	i, 23
<i>RKO General, Inc. v. FCC</i> , 670 F. 2d 215 (D.C. Cir. 1981), <i>cert. den.</i> , 102 S. Ct. 1974 (1982)	8, 18
<i>Steadman v. SEC</i> , 450 U.S. 91 (1981)	20

Constitutional Provisions:

U.S. Const., Amend. I	i, 2, 23
-----------------------------	----------

Statutory Provisions:

18 U.S.C. § 1341	17
28 U.S.C. § 1254 (1)	2
Communications Act of 1934, as amended,	
47 U.S.C. § 154(j)	2
47 U.S.C. § 307(b)	19
47 U.S.C. § 308	3, 23
47 U.S.C. § 309(a)	3, 23
47 U.S.C. § 309(e)	4, 5, 7, 16, 23
47 U.S.C. § 402(b)	24
47 U.S.C. § 402(j)	2

Administrative Decisions, Reports And Proceedings:

<i>Cowles Broadcasting, Inc. (WESH-TV), 86 FCC 2d 993 (1981)</i>	2, 15, 21
<i>Cowles Florida Broadcasting, Inc., 78 FCC 2d 500 (Initial Decision, 1973)</i>	8, 14
<i>Cowles Florida Broadcasting, Inc., 60 FCC 2d 372 (1976), recon. den., 62 FCC 2d 953 (1977); recon. den., 40 Rad Reg. 2d (P&F) 1627 (1977)</i> ..	2, 8, 23
<i>Formulation of Policies Relating to the Broadcast Renewal Applicant Stemming From the Comparative Renewal Process Docket No. 19154, (Notice of Inquiry), 27 FCC 2d 580 (1971)</i>	13, 14
<i>Formulation of Policies Relating to the Broadcast Renewal Applicant Stemming From the Comparative Renewal Process (Further Notice of Inquiry), 31 FCC 2d 443 (1973)</i>	14
<i>Formulation of Policies Relating to the Broadcast Renewal Applicant Stemming From the Comparative Renewal Process (Second Further Notice of Inquiry), 43 FCC 2d 367 (1973)</i>	14
<i>Formulation of Policies Relating to the Broadcast Renewal Applicant Stemming From the Comparative Renewal Process (Third Further Notice of Inquiry), 43 FCC 2d 822 (1973)</i>	14
<i>Formulation of Policies Relating to the Broadcast Renewal Applicant Stemming From the Comparative Renewal Process (Report and Order), 66 FCC 2d 419 (1977)</i>	14, 15
<i>Formulation of Policies Relating to the Broadcast Applicant Stemming From the Comparative Renewal Process, BC Docket No. 81-742 (Notice of Inquiry), 88 FCC 2d 120 (1981)</i>	15, 16
<i>Letter to Telrad, Inc., FCC Mimeo No. 87471 (Dated May 16, 1960)</i>	19

<i>Policy Statement on Comparative Broadcast Hearings</i> , 1 FCC 2d 393 (1965)	13
<i>Policy Statement on Comparative Renewals</i> , 22 FCC 2d 424 (1970)	13, 14
<i>RKO General, Inc. (WNAC-TV)</i> , 78 FCC 2d 1 (1980), <i>aff'd</i> , <i>RKO General, Inc. v. FCC</i> , 670 F. 2d 215 (D.C. Cir. 1981), <i>cert. den.</i> , 102 S. Ct. 1974 (1982)	8, 18

Administrative Agency Regulations:

Telecommunications (Chapter 47)

47 C.F.R. § 165	20, 21
47 C.F.R. § 73.606	19
47 C.F.R. § 73.613	19
47 C.F.R. § 73.1125	19

Other Authorities:

<i>Hearing Before the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities</i> , 94th Cong., 1st Sess., Vol. 4 (1975)	7
---	---

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

CENTRAL FLORIDA ENTERPRISES, INC.

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION
COWLES BROADCASTING, INC., COWLES
COMMUNICATIONS, INC., NATIONAL BLACK
MEDIA COALITION,

Respondents

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

The Petitioner Central Florida Enterprises, Inc.* respectfully prays that a writ of certiorari issue to review the judgment of and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on July 13, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals reported as *Central Florida Enterprises v. FCC*, 683 F. 2d 503 (D.C. Cir. 1982),

*Central Florida Enterprises, Inc., has no parent, subsidiary, or affiliated companies.

appears in Appendix A. Another and earlier decision of the Court of Appeals in this case, reported as *Central Florida Enterprises v. FCC*, 598 F. 2d 37 (D.C. Cir. 1978), also appears in Appendix A. The decision and orders of the Federal Communications Commission reported as *Cowles Broadcasting, Inc. (WESH-TV)*, 86 FCC 2d 993 (1981), appear in Appendix A. Other and earlier decisions of the Commission, reported as *Cowles Florida Broadcasting, Inc. (WESH-TV)*, 60 FCC 2d 372 (1976), *Cowles Florida Broadcasting, Inc.*, 40 Rad. Reg. 2d (P&F) 1627 (1977), appear in Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on December 4, 1981 (Appendix A). A timely petition for rehearing and suggestions for rehearing *en banc* were denied on October 15, 1982. The jurisdiction of this Court is invoked under 47 U.S.C. §402(j) and 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States:

Congress shall make no law ... abridging the freedom of speech....

United States Code, Title 47:

Section 154. Federal Communications Commission

.....

(j) Conduct of proceedings; hearings

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice....

Section 308. Same [Licenses]; application....

(a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it....

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, financial, technical and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

* * *

Section 309 Application - Consideration in granting application:

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 of this title applies,

whether the public interest, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that the public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * *

(e) If, in the case of any application to which subsection (a) applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining.... Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interests shall be permitted to participate....

STATEMENT OF THE CASE

No challenger has *ever* displaced an incumbent television licensee on comparative evaluation in FCC licensing proceedings. Since 1974, no competing applicant has even so much as filed an application with the FCC to attempt to challenge a television licensee at renewal. Under its *Ashbacker* decision,¹ the Supreme Court has guaranteed to challengers at license renewal time the right to file competing applications to displace incumbent licensees. There has been effected, for all purposes, a "chilling", if not nullification, of the statutory right of challengers to have an opportunity for First Amendment expression.

¹*Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945); See Section 309 (e) of the Communications Act of 1934, as amended, 47 U.S.C. §309(e).

In 1969, Petitioner (hereinafter "Central"), a group almost wholly owned by local citizens, determined to file with the FCC an application to supplant Cowles Florida Broadcasting, later Cowles Broadcasting, Inc. (hereinafter "Cowles") as operator of Television Station WESH-TV.

The principal impetus which led to the decision of Central to challenge Cowles for the renewal of license of WESH-TV was the simple fact that Cowles had deliberately moved the main studio of WESH-TV, the only station licensed to Daytona Beach, Florida, from the Daytona Beach area more than 70 miles southward to the Orlando area because of the "lure" (the FCC's words) of larger revenues.

There was another barrier to what would otherwise have been routine FCC grant of the WESH-TV renewal application, the culmination of years of investigation into nationwide consumer fraud by five Paid During Service subsidiaries of Cowles' parent corporation, Cowles Communication, Inc. (hereinafter "CCI"), in promoting and obtaining magazine subscriptions. By the fall of 1969, the PDS companies were under investigation by various state and federal agencies. In 1970, after being informed that the Justice Department intended to investigate the entire industry, CCI initiated negotiations which resulted in 50 *nolo contendere* pleas by the five CCI subsidiaries and payment of the maximum monetary fines assessable by law had the cases gone to trial and guilty verdicts been obtained. In companion civil proceedings entered into in the same federal court, the same five CCI PDS subsidiaries, guaranteed by CCI, agreed to be bound by comprehensive U.S. District Court orders enjoining several specific fraudulent sales and collection practices. The economic effect of these Court proceedings on CCI was enormous; according to the FCC testimony of the U.S. Attorney

primarily responsible for handling the CCI PDS matters, discontinuance of the CCI PDS subsidiaries' practices, as required by Court decree, led to the demise of *Look Magazine*.

The Circuit Court's 1978 Opinion

On September 15, 1978, a panel of the United States Court of Appeals for the District of Columbia Circuit, by unanimous decision, vacated FCC proceedings granting renewal of license of WESH-TV and denying Central's mutually exclusive application. *Central Florida Enterprises v. FCC*, 598 F. 2d 38 (1978) *reconsidered and clarified*, 598 F. 2d at 52 (1979) (hereinafter "*Central Florida I*"). The Court, citing precedent, adverted to the "unsatisfactory state of Commission practice in comparative renewal," 598 F. 2d at 41, fn 2. After tracing the legislative history of the Communications Act and precedent on point, the Court concluded that it was "embarrassingly clear" that the Commission had practically erected a presumption of renewal inconsistent with the full hearing requirement of *Ashbacker* and Section 309(e) of the Communications Act, 598 F. 2d at 40-44, 59-61.

The Court held it was error for the Commission to assess only a slight demerit against Cowles for violation of the main studio rule. The FCC had found that the move was not effected in deliberate defiance of Commission Rules and Central had made no showing that service to Daytona Beach had suffered as a result of the *de facto* move. *Central Florida I*, 598 F.2d 52.

In *Central Florida I*, the Court had two principal difficulties with the FCC's treatment of "mail fraud" issues which it had designated for evidentiary hearing in the Cowles-Central WESH-TV proceedings. First, the FCC had made no findings and conclusions concerning persons

who were principal officers of both Cowles, CCI, and the five CCI PDS subsidiaries. 598 F. 2d at 45. Thus, the Court found unsupportable the FCC's findings that there was no connection between Cowles and the five CCI PDS subsidiaries apart from common ownership. The Court required the FCC to reconsider its findings and, if appropriate, to reconsider the relevance of wrongdoing by a related corporation sharing principal officers with the licensee.

Second, in *Central Florida I*, the Court was "troubled" by Central's allegations that the inquiry was curtailed in two major respects. *First*, the ALJ had erroneously quashed *subpoenas ad testificandum* requiring the deposition testimony of the Postal Inspectors conducting the mail fraud inquiry. The Postal Service had resisted these *subpoenas* on grounds of administrative convenience and an unparticularized claim of privilege. Central argued that under the *Ashbacker* case and Section 309(e) of the Communications Act the energies of the government should be directed towards developing a full record. It later developed that one of the Postal Inspectors had conducted an improper "mail cover" for an extensive period.² Perhaps this was a reason for his reluctance to testify in public FCC proceedings. The other Postal Inspector did take the witness stand when he happened to be in the FCC hearing room but he claimed privilege when the ALJ directed him to answer a question propounded by Central's counsel. A recess was set to afford an opportunity for the Postal Inspector to consult with counsel for the Postal Service. The Postal Inspector agreed to return to FCC proceedings that afternoon. When he did not, the ALJ denied Central's request for issuance of *subpoena ad testificandum*. *Second*, prejudicial error evoking the concern of the Court occurred

²Hearings Before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, 94th Cong., 1st Sess., Vol. 4 at 70-83 (1975).

when the ALJ and FCC arbitrarily declined to expand inquiry under the "mail fraud" issues to inquire into the facts and circumstances under which CCI and the five CCI PDS subsidiaries entered into consent proceedings involving similar allegations and conduct resulting in consent proceedings by the Federal Trade Commission, and various law enforcement officials in the states of Wisconsin, California, Pennsylvania and Michigan and the City of New York.

Even on the limited FCC record which was developed on the mail fraud issues, the ALJ reached conclusions which he characterized as "harsh", finding that CCI had acquired PDS operations which "it must have realized" would be inclined to massive fraud. CCI's supervision was "spotty and ineffectual", its internal investigation coming "late in the day" when CCI recognized "that various government agencies were about to call it to account." It was "inconceivable that it could have... been unaware" of such corruption "unless it chose to be."³ Essentially, the FCC had confirmed these findings and conclusions but attributed no fault to Cowles the licensee because Cowles had not been implicated in PDS and there had appeared to be no criminal case against CCI or its personnel.⁴ That is why the Court had determined that the FCC had committed error.⁵

The Commission correctly found that Central was entitled to a "clear" preference under the criterion of

³Cowles *Florida Broadcasting Inc.*, 78 FCC 2d at 500, 545-546 (Initial Decision 1973); *Central I, supra*, 598 F. 2d at 45.

⁴Cowles *Florida Broadcasting, Inc.*, 60 FCC 2d 372, 405-406 (1976); *Central I, supra*, 598 F.2d 52 at n. 71.

⁵Compare *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 1 (1980), *affirmed*, *RKO General, Inc. v. FCC*, 670 F. 2d 215 (D.C. Cir. 1981), *cert. den.*, 102 S. Ct. 1974.

diversification of mass media of communications.⁶ On review, the court held that it had been unreasonable for the FCC to have accorded this preference "little decisional significance." The Court directed the FCC, upon remand, to reconsider its conclusions in light of the following: (1) the conceded relevance of diversification of media ownership in the comparative renewal context; (2) the materiality of related media interests *anywhere in the Nation*; (3) the evident hazards of relying upon local management autonomy as a surrogate for diversification of media ownership.⁷

The past broadcast record of WESH-TV was variously described as "thoroughly acceptable" (ALJ), "superior" (FCC), on reconsideration (by the FCC) as "substantial" in order that it would not convey the impression that "...past programming was exceptional when compared to programming in the service area or elsewhere."⁸ This was unconvincing to the Court which, on review, stated that Cowles' "unexceptional" past performance could not support a finding that its service would be better than Central's.⁹ In light of the "agitated concern" expressed by the Commission about threats to "industry stability", the Court, on reconsideration, pointed out *that since 1961 no incumbent television or radio station licensee had ever lost its license on the basis of the comparative criteria in any Commission proceeding.*¹⁰ The Court directed the FCC to

⁶The Cowles organization owns 23% of the *New York Times* media complex. The record shows significant interrelationships between Cowles and the *Des Moines Register and Tribune* and the *Minneapolis Star and Tribune* complexes.

⁷*Central Florida I*, *supra*, 598 F. 2d at 53-54.

⁸*Central Florida I*, 598 F. 2d at 56-57.

⁹*Central Florida I*, 598 F. 2d at 60.

¹⁰*Central Florida I*, 598 F. 2d at 60-61.

engage in particularized balancing and weighing of the significance of past broadcasting rather than rely on "...several unenlightening recitals that there are expectations implicit in the Act." In so doing the Court recognized that the FCC plainly disfavored implementing the "full hearing" requirement of the Communications Act for comparative renewals.¹¹

1982 Circuit Court Decision

On July 13, 1982, the D.C. Circuit Court, after further review of FCC proceedings, affirmed a decision of the FCC which again renewed the license of WESH-TV. *Central Florida Enterprises, Inc. v. FCC*, 638 F. 2d 503 (1982) (hereinafter "*Central Florida II*"). Central requests this Court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review that decision.

REASONS FOR GRANTING THE WRIT The Central Florida II Decision Has Created A Chilling Effect On Opportunities For Potential First Amendment Expression

In determining to renew again the WESH-TV license, the Circuit Court indicated, in *Central Florida II*, that it would continue to evaluate comparative renewals carefully. With all due respect and deference to that pronouncement, Central respectfully submits that for all purposes there has resulted a "chilling"¹² effect on opportunities for First Amendment expression contrary to the statutory

¹¹*Citizens Communications Center v. FCC*, 441 F. 2d 1201 (D. C. Cir. 1971), clarification granted, 463 F. 2d 822 (D. C. Cir. 1972).

¹²*Id.*

requirement that Section 309(e) of the Communications Act provide a "competitive spur" to Commission licensees through the prospect that a competing applicant may seek to replace them at renewal time if they do not provide service in the public interest.

In the WESH-TV case, which, as the Court has recognized, may well be a "typical" comparative renewal,¹³ persons associated with the broadcasting industry exhibited their usual lack of enthusiasm for displacement of a regular television renewal applicant. An equipment representative from the Ampex Corporation informed Central's counsel that Ampex would accept no credit commitment requests from groups seeking to challenge license renewal applicants. The Bank of New York, after having received a \$4,000.00 commitment fee from Central for an \$800,000 credit letter, declined to appear to substantiate that credit commitment at FCC hearing proceedings. The explanation given to Central's counsel was that the bank did not want to cause offense to its customers in the broadcasting industry by the possibility that it would jeopardize its opportunities to provide financing for station transactions by established broadcasters. Such tactics do not seem to be visited upon Commission licensees; only upon those who seek to displace them.

A person under subpoena by the government as a witness under the "mail fraud" issues contacted counsel for Central and attempted to extort money for favorable testimony. A report of this direct attempt to affront the integrity of the FCC's process was made to the ALJ by Central's counsel and by his wife, who had listened to the attempted extortion

¹³*Central Florida I, supra*, 598 F.2d at 40; See *Central Florida II*, 683 F.2d at 506, fn. 10.

on a telephone extension.¹⁴ The FCC refused to address this affront to its process though Central complained of it to the ALJ and the FCC.¹⁵

On June 1, 1979, after issuance of the Court's opinion in *Central Florida I*, Central, Cowles, and the FCC submitted to the Court a Stipulation to Dismiss Appeal from Order Denying Central's Application for Modification of Construction Permit. That filing incorporated by reference the FCC's simultaneously filed Motion for Modification of Judgment, in which the FCC, in agreeing to the Stipulation, suggested that while it had no objection to dismissal of Central's appeal, it did read the Court opinion(s) in *Central Florida I* as requiring further FCC consideration in light of questions remaining relating to Central's character qualifications. Cowles, however, unilaterally receded from the stipulation which had been entered into and filed with the Court by submitting a pleading which urged the Court to dismiss the *entire* case, which the Court properly refused to do. The stipulation was disapproved. Central was thus faced with two prospects: unilateral abandonment of its appeal or continuing its (then) ten year old efforts to displace Cowles.¹⁶ Central chose the latter course. Under Commission policy, Central, whose *bona fide* efforts to prosecute its application are unquestioned, cannot even negotiate with Cowles to recoup out-of-pocket expenses of prosecuting its application. This is another factor "chilling" the efforts of challengers to even attempt to displace regular renewal applicants. Cowles' misconduct in unilaterally repudiating its stipulation was ratified by the FCC.

¹⁴WESH-TV, FCC Docket No. 19168, Tr. 504-526, 3798-3813, 2908-3915.

¹⁵*Cowles Florida Broadcasting, Inc.*, 60 FCC 2d 272 at Para. 104; *Cowles Florida Broadcasting, Inc.*, 86 FCC 2d 993 at Para. 10, fn. 9.

¹⁶These were the only options available under FCC policy, approved by the D. C. Circuit Court, which for years refused to allow any settlements of comparative renewal cases in which renewal applicants agreed to reimburse challengers for out-of-pocket expenses. *Greensboro Television v. FCC*, 502 F. 2d 475 (D. C. Cir. 1974).

The FCC Has Yet To Adopt Rational Standards For The Comparative Renewal Process

The FCC has yet to adopt meaningful policy standards for comparative renewal cases. The only clear policy is that incumbent renewal applicants are given a conclusive presumption over challengers. For many years the FCC, in comparative renewal cases, theoretically applied the *1965 Comparative Policy Statement on Broadcast Hearings*, 1 FCC 2d 393 (1965). That *Policy Statement* was applied in this case. The factors considered are: (1) diversification of ownership of mass media; (2) participation of owners in station management; (3) proposed program service; (4) past broadcast record (if outside the bounds of average performance); (5) efficient use of frequency; (6) character. A careful weighing of the record would indicate that Central was preferred on each of the criteria; yet ultimate preference was given to Cowles on the grounds of "industry stability", whatever that is. This, however, does not substitute for articulated standards which must be mutually applied to ensure administrative due process. Yet, after several efforts, the FCC has adopted only *post hoc* rationales which lack standards necessary to survive judicial review.

In *Citizens Communications Center v. FCC*, 447 F. 2d 1201, the Circuit Court in 1970 struck down as unlawful and in derogation of the *Ashbacker* rights of challengers the *1970 Policy Statement On Comparative Renewals*, 22 FCC 2d 424 (1970). While the *Citizens* case was pending, the FCC adopted its 1971 *Notice of Inquiry in Formulation of Policies I*.¹⁷

¹⁷*Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming From the Comparative Hearing Process, Docket No. 19154 (Notice of Inquiry)*, 27 FCC 2d 580 (1971). (Hereinafter *Formulation of Policies I*).

In invalidating the FCC's 1970 *Policy Statement* on comparative renewals, the *Citizens* court "noted with approval" that "rule making proceedings [on comparative renewal policy] may be under way."¹⁸ Upon receiving the *Citizens* decision, the FCC issued a *Further Notice of Inquiry in Formulation of Policies I*, 31 FCC 2d 443 (1971), which expressed uncertainty as to the effect of the court's mandate on the FCC's discretion to develop comparative renewal policy *ad hoc*, rather than in rulemaking.

In ruling on the FCC's subsequent petition for further relief, clarification of mandate and/or mandamus, the *Citizens* court took notice of the FCC's concern and apparent preference for case-by-case development of policy and stated that "this court at this time will not require the FCC to proceed by rule making since that judgment is one basically for the Commission."¹⁹ The FCC then continued its inquiry in *Formulation of Policies I*, issuing *Second*²⁰ and *Third*²¹ *Further Notices*, only to conclude in a 1977 *Report and Order*²² that more definite policy standards were undesirable and that it was best to leave comparative renewals to the hearing process on a case-by-case basis. The FCC decided the WESH-TV case by using *ad hoc* criteria.²³ However, in *Central Florida I*, the Court was sharply

¹⁸*Citizens*, *supra*, 447 F. 2d 1201, at 1213, n. 35.

¹⁹*Citizens*, *supra*, as clarified, 463 F. 2d 822, 823-824 (1972).

²⁰43 FCC 2d 367 (1973).

²¹43 FCC 2d 822 (1973).

²²66 FCC 2d 419 (1977).

²³*Cowles Florida Broadcasting, Inc.*, 78 FCC 2d 500 (1973) (Initial Decision), 60 FCC 2d 372 (1976), *recon. denied and clarified*, 62 FCC 2d 953 (1977), *recon. denied*, 40 Rad. Reg. 2d (P&F) 1627 (1977).

critical of the FCC's *ad hoc* approach to the comparative renewal process.²⁴ On remand of the *Central Florida I* case, a majority of the FCC issued - or - more accurately reissued - a decision in favor of Cowles.²⁵

When Central again took an appeal to the D.C. Circuit Court, the FCC issued, in November of 1981, another Notice of Inquiry relating to comparative renewal policy, *Formulation of Policies II*.²⁶ The FCC, citing its 1977 Policy Statement on Comparative Renewals²⁷ noted that it had chosen to weigh the various factors involved in comparative renewal licensing on a case-by-case basis. In so doing, the FCC chose to ignore that in *Central Florida I* the D.C. Circuit had found the 1977 *Comparative Renewal Policy Statement* was not that different from the 1970 *Comparative Renewal Policy Statement* which the court struck down in the *Citizens* case, *supra*. The 1981 FCC *Notice of Inquiry* sought guidance concerning whether the Commission should exercise its discretion and formulate through a rulemaking type proceeding standards for determining when an incumbent licensee's record will be considered of such a caliber to outweigh disadvantages that the incumbent might face in a comparative renewal proceeding under the diversification and predictive criteria normally dominant in a comparative hearing confined to new applicants. That inquiry has failed to set any predictive standards for the comparative renewal process, particularly in the critical area of programming or character.

²⁴*Central Florida Enterprises v. FCC*, 598 F. 2d 37 (D. C. Cir. 1978), *reh'g en banc denied and modified*, 598 F. 2d 58 (1979), *cert. dismissed*, 441 U.S. 957 (1979).

²⁵*Cowles Broadcasting*, 86 FCC 2d 993 (1981).

²⁶*Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, BC Docket No. 81-742 (*Notice of Inquiry*), 88 FCC 2d 120 (1981). (Hereinafter "*Formulation of Policy II*.")

²⁷*Formulation of Policies Relating to the Broadcast Renewal Applicant Stemming from the Comparative Renewal Process, (Report and Order)*, 66 FCC 2d 419 (1977).

**The FCC Has Resisted Its Obligation
To Carry Out Its Statutory Duty To
Apply The Full Hearing Requirement To
The Comparative Renewal Process**

The decisions of the D.C. Circuit in the *Citizens*,²⁸ *Greater Boston*,²⁹ and *Central Florida*³⁰ cases are replete with unsuccessful efforts of the broadcasting industry and the FCC to repeal the legislative mandate requiring application of the full hearing *Ashbacker* rights to challengers to renewal applicants under Section 309(e) of the Act.

On September 17, 1981, the FCC voted to recommend to Congress that Section 309 of the Act be amended to provide for a two-tiered approach to broadcast licensing renewals.³¹ It is plain from Congressional testimony of FCC Chairmen Burch, Wiley, Ferris, Lee and Fowler that the FCC has disfavored implementation of the full hearing *Ashbacker* requirement of Section 309(e) of the Act to comparative renewal proceedings. In the absence of that Congressional relief, the FCC has virtually repealed the full hearing requirement of Section 309(e) of the Act in comparative renewals.

Counsel for Central was impelled to invoke judicial assistance to get the WESH-TV case decided after remand to the FCC. On January 23, 1981, the D.C. Circuit Court ordered the FCC to show cause why a decision should not issue "now." The FCC's decision was not issued for another five months, or on June 19, 1981, *two years* after the Clerk

²⁸*Citizens*, 447 F. 2d 1201 (1971).

²⁹*Greater Boston Television Corporation v. FCC*, 444 F. 2d 841 (D. C. Cir. 1970).

³⁰*Central Florida I*, 598 F. 2d 38 (1978).

³¹*Formulation of Policies II*, 88 FCC 2d at 22, fn. 1.

issued the Court's mandate in *Central Florida I*. Since Central first filed its application, there have been five different FCC Chairmen and nineteen different Commissioners.

**The FCC And The D.C. Circuit Court Were
Incorrect in Attributing No Demerit Against
Cowles For Misconduct Demonstrated On The Mail Fraud
Issues**

Mail fraud is a crime of moral turpitude.³² Yet, even after review of the *Central Florida I* decision on remand, the FCC refused to assess even the slightest demerit against Cowles. This was error.

The FCC concluded that no useful purposes would have been served by expanding inquiry into the proceedings before the Federal Trade Commission and in the states of California, Michigan and Pennsylvania and New York City in which such inquiry had been curtailed, contrary to *Central Florida I*. This is a *non sequitur*. Without such inquiry it is impossible to have carried out the requirement of *Central Florida I* that the FCC consider the implications of the fact that key officers of CCI and Cowles who were also key officers of the five CCI PDS subsidiaries made important management decisions considering fraudulent activities of which CCI (and thus Cowles) "could not have been unaware."

As the FCC's Broadcast Bureau concluded long ago in urging to the FCC that a substantial character demerit be assessed against Cowles, the record does not reflect remorse, regret, or even a single instance in which restitution was made from the fraudulent activities in which

³²18 U.S.C. §1341.

the CCI-Cowles and CCI-PDS subsidiaries' common officers were implicated. As the FCC and Court had found, CCI did little to correct this extremely profitable misconduct until it was necessary to do so to head off the adverse effects of governmental investigations.

If the FCC had assessed even a small character demerit against Cowles, the balance could have tipped against Cowles in what the FCC described as a "close and difficult case." This was error. A different character standard has thus been adopted for *Central Florida II* from that followed in the *RKO General, Inc.* case.³³ The only commonality of officers and directors in *RKO* and its parent corporation, General Tire, was through a single common Board Chairman. Yet, the FCC attributed misconduct of General Tire to *RKO*. This differing set of standards should not be allowed to stand.³⁴ Indeed, in a *Notice of Inquiry* issued in 1982, the Commission indicates that it desires to relax its standards of character requirement, thus raising question as to whether, contrary to well established precedent,³⁵ a Commission licensee must show that it will be a fiduciary for the public.

The FCC And The Circuit Court Were Incorrect In Evaluating The Main Studio Violation

The ALJ and the FCC both directed Cowles to move its main studio back to Daytona Beach. This was necessary to

³³*RKO General, Inc.*, 78 FCC 2d 1 (1980), *affirmed*, *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1974.

³⁴*Melody Music v. FCC*, 345 F. 2d 730 (D. C. Cir. 1965).

³⁵*Office of Communication of the United Church of Christ v. FCC*, 359 F. 2d 994 (D. C. Cir. 1966); *Office of Communication of United Church of Christ v. FCC*, 425 F. 2d 543 (D. C. Cir. 1969).

redress continuing harm *per se*, for Cowles had engaged in intentional violation of the Commission's main studio rule, Section 73.613.³⁶ Under Section 307(b) of the Communications Act of 1934, as amended, the Commission is required to distribute broadcast stations among the various states and communities. Pursuant to that statute the Commission adopted a Table of Television Assignments, Section 73.606 of the Commission's Rules, which assigned Channel 2 to Daytona Beach. Section 73.613 requires Cowles to keep its main studio in the Daytona Beach area. The only way for Cowles to have moved its station (WESH-TV) to the Orlando area would have been through rulemaking. Cowles circumvented FCC rulemaking requirements.

Cowles was on *specific notice* that WESH-TV could not move its main studio from the Daytona Beach area to the Orlando area.³⁷ The record shows that Mr. Thomas Gilchrist, WESH-TV's General Manager, testified that the Cowles management directed him to move from Daytona Beach to Orlando, that the move was delayed for a year, that he repeatedly advised Cowles' management that he (Gilchrist) should remain in Daytona Beach, and that he believed that the move to Orlando was improper and in direct contravention of advice of counsel.

If WDVM-TV, Channel 9, Washington, were the only television station licensed to Washington, and moved its main studio to Baltimore (which is actually closer than Orlando is to Daytona Beach), the city of required license

³⁶47 C.F.R. §73.613 [deleted by Order effective February 19, 1982, 50 Rad. Reg. 2d (P&F) 1362]. The main studio rule is now found at Section 73.1125 of the Commission's Rules, 47 C.F.R. §73.1125.

³⁷FCC Letter to Telrad, Mimeo No. 87471, May 16, 1960; *Central Florida I, supra*, 598 F. 2d at 45.

location would be wrongfully deprived of an outlet for local news, public affairs, and editorial comment. This would be nothing less than *de facto* reallocation of a television channel.³⁸ It would, of course, be very difficult for persons in Washington to show how the public interest would be harmed by an unauthorized move of WDVM-TV from Washington to Baltimore because it would mean showing what programming would have been presented had WDVM-TV remained in Washington. FCC precedents wisely provide that the licensee make a showing meeting the burden of proof necessary to grant renewal in spite of plain and continued violation of an important rule, the main studio requirement. Cowles elected to make its showing on main studio violations by introducing evidence about programming limited to a period of the last month of the relevant three year license period, by which time Cowles was aware that Central had filed with the FCC an application seeking to displace Cowles. Thus, Cowles' showing is not supported by substantial evidence showing representative conduct for the entire license period.³⁹

The FCC And The Circuit Court Improperly Evaluated The Diversification Of Mass Media

FCC Rule 1.65⁴⁰ requires applicants to advise the FCC of all significant changes in a pending application through filing of amendments within 30 days and serving copies of those amendments upon counsel. In *Central Florida I*, the D.C. Circuit Court had directed the FCC to consider, in its comparative evaluation of Cowles and Central, the importance of media interests anywhere in the Nation. Yet, after Court remand, Cowles failed to amend its application

³⁸*Communications Investment Corp. v. FCC*, 641 F. 2d 954 (D. C. Cir. 1981).

³⁹*Steadman v. SEC*, 450 U.S. 91 (1981).

⁴⁰47 C.F.R. §1.65.

to update literally *scores*⁴¹ of additional acquired media interests attributable to Cowles which were not reported to the FCC as required by Rule 1.65. Cowles thus willfully impeded the compilation of a meaningful record required by the Court in *Central Florida I*.

The FCC and the Court trivialized these violations by saying they did not matter very much, anyway, citing this Court's holding in *National Citizens Committee for Broadcasting v. FCC*, 436 U.S. 755 (1975), ("*NCCB*"). But that case involved the question of whether there was a threat to television industry stability caused by government ordered across-the-board divestiture of television stations by colocated newspapers, not whether under the full comparative hearing evaluation required by *Ashbacker*, *Citizens*, and *Central Florida I*, diversification of mass media ownership is an appropriate criterion for evaluation. Besides, the *NCCB* decision considered data showing that as a group, television stations owned by colocated newspapers actually provided a *superior* quality of television service, a situation which did not obtain where programming of WESH-TV is concerned.

The FCC And The Court Improperly Evaluated Cowles' Past Broadcast Record

The ALJ, the FCC, and the D.C. Circuit court all recognized that Cowles did violate the FCC's main studio rule and did deliberately relocate the WESH-TV main studio in the Orlando area because of the lure of greater revenues. Yet, nowhere was this glaring deficiency in programming service intelligibly evaluated in considering the past record of Cowles. Indeed, as the Court in *Central Florida II* recognized at fn 27, the FCC has not defined or

⁴¹*Cowles Broadcasting*, 86 FCC 2d at 1015-1018.

explained the distinctions, if there are any, among thoroughly acceptable, substandard, meritorious, average, above average, not above average, not far above average, above mediocre, more than minimal, solid, sound, favorable, not superior, not exceptional, and unexceptional.⁴² The Court wanted to know what the standard of comparison was in each case. "Average" compared to all applicants? "Mediocre" compared to all incumbents? To stations in Orlando? Yet, in spite of the lack of articulated standards required by reasoned decisionmaking, WESH-TV has been allowed to carry the day in the name of "renewal expectancy." Central has wrongly been expected to show harm to the public interest by violation of the main studio rule. The plain fact is that the ALJ and the FCC already found such harm in that both required Cowles to relocate the WESH-TV main studios in the required location of Daytona Beach area.

**The FCC And The Court Have Used Improper
Legal Standards In Making The
Comparative Evaluation Mandated By Ashbacker**

The Review Board, not once but twice, denied Cowles' requests to enlarge issues against Central relating to proposed service: Cowles argued, not without *chutzpah*, that Central's proposal would result in "diminution of service" when compared to Cowles' use of its so-called "auxiliary studios" in the Orlando area. Thus, under the law of the case, comparison of programming proposals was irrelevant. However much the "paper proposals" of challengers might be of moment in some cases, they could not be of any moment in this one. Central proposed to return the station to its proposed community of license, Daytona Beach. Cowles did not. Central was entitled to

⁴²*Central Florida II*, 683 F. 2d at 508, fn. 27.

clear preferences in the area of diversification of ownership of mass media, integration of ownership and management.

Central submits that the public is entitled to an "industry stability" not addressed by the FCC or the Circuit Court; i.e., an assurance that principals of a Commission licensee, as a "fiduciary" of a "scarce natural resource for the public", will not be involved in mail fraud; assurance that a television station will not be "slyly relocated"⁴³ more than 70 miles away. Under this Court's *Red Lion* case,⁴⁴ it is the First Amendment rights of viewers and listeners which are paramount, not those of the broadcasters. The citizens of Daytona Beach were entitled to assurance that their only licensed station, WESH-TV, serve as an outlet for local news and public affairs and other local programming. Cowles ignored these obligations in succumbing to the "lure" of larger revenues at Orlando. There remain unexamined legitimate First Amendment claims concerning diversification of mass media. *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945). All of the basic and comparative criteria were weighed towards Central; yet, Cowles was renewed solely on the basis of subjective *post hoc* determinations.

The Court in *Central Florida II* has expressed concern about lack of FCC standards for comparative renewal proceedings. The Court has stated that it will examine future comparative renewal cases carefully. The plain fact is, however, that no further challengers will most likely ever occur. Contrary to law, Central has been expected to show why the WESH-TV license should not be renewed. Sections 308 and 309 of the Act require that that burden be placed on Cowles and that the FCC must make an affirmative public interest finding warranting grant of the WESH-TV renewal and denying Central's application. These actions cannot stand.

⁴³*Central Florida I*, *supra*, at 52.

⁴⁴*Red Lion Broadcasting, v. FCC*, 395 U.S. 396 (1969).

CONCLUSION

Under Section 402(b) of the Communications Act of 1934, as amended, the D.C. Circuit Court has exclusive jurisdiction to review FCC licensing proceedings. There is no conflict between decisions of different circuit courts which ought to be resolved by the Supreme Court. However, the protectionism of the FCC towards incumbent licensees has raised important questions regarding creation of property rights and interest beyond those which the limited licensing scheme for broadcasting licenses enacted by the Congress has created for administration of sound communications policy. The facts and opinions in this case also present questions relating to interpretation of this Court's opinion in the *Ashbacker* case, and whether there has been created a chilling climate on opportunities for First Amendment expression which should be addressed by the Supreme Court.

Respectfully submitted,

JOSEPH F. HENNESSEY*

LEE G. LOVETT

LOVETT, HENNESSEY, STAMBLER
& SIEBERT, P.C.

1901 L Street, N.W.

Suite 200

Washington, D.C. 20036

(202) 293-7400

Counsel For Petitioner
Central Florida
Enterprises, Inc.

*Counsel of Record

February 14, 1983